United States Court of Appeals

for the Second Circuit

INTERVENOR'S BRIEF

74-1611

Signed original

COURT OF APPEALS NO. 74-1611

In The
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

B

P/S

REA EXPRESS, INC. et al.,

Petitioners,

-against-

CIVIL AERONAUTICS BOARD, et al.,

Respondents.

Petition for Review of an Order

Of the Civil Aeronautics Board

BRIEF OF INTERVENORS

NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC.
DRUG AND TOILET PREPARATIONS TRAFFIC CONFERENCE
and EASTERN INDUSTRIAL TRAFFIC LEAGUE, INC.

By their attorney,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REA EXPRESS, INC. et al,	:	
Petitioners,	:	No. 74-1611
-against-	:	
CIVIL AERONAUTICS BOARD, et al,	:	
Respondents.	:	

BRIEF OF INTERVENORS NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC. DRUG AND TOILET PREPARATION TRAFFIC CONFERENCE and EASTERN INDUSTRIAL TRAFFIC LEAGUE, INC.

QUESTION PRESENTED

Is the shipping public entitled under Sec. 404(a) of the Federal Aviation Act of 1958 to air transportation having the characteristics of REA air express service?

STATEMENT OF THE CASE

National Small Shipments Traffic Conference, Inc., Drug And Toilet Preparation Traffic Conference and Eastern Industrial Traffic League, Inc. (collectively referred to herein as the "shipper leagues") submit this brief in support of a petition by REA Express, Inc. ("REA") that Order No. 74-5-25 of the Civil Aeronautics Board ("Board") dated May 6, 1974 be annulled. This Order requires the termination of air express service

furnished by REA as of July 31, 1974. The shipper leagues also support the request of REA Express, Inc. for the reversal of the related Order No. 74-5-23 dealing with the Board's investigation of air express rates.

These Orders resulted from two proceedings initiated by the Board in response to requests from REA for a permanent air express arrangement with the airlines embodying provision for arbitration of future disputes, authority for REA to file its own air express tariffs independentally of the airlines and supervision of airline charges by the Board to insure that charges to REA are fair in relation to charges for other cargo. Express Service Investigation, Docket 22388 and Investigation of Express Rates, Docket 22387. Rather than grant any of the relief sought, the Board instead ordered an end to REA's air express service and proffered to REA an air freight forwarder's certificate.

Order 74-5-25 requiring termination of air express service contemplates that it will be succeeded by "a new system for priority handling of air freight" provided for in "appropriate tariffs" by "the carriers." (page 18). Suffice it to say that the new priority service is not yet in existence nor has a single piece of freight moved in it.

Air express presently is a comprehensive service. Under the tariffs filed by the airlines and REA,* they together undertake to transport "expeditiously from consignor's door" via airports of origin and destination. They will also accept a "shipment at origin airport" or "deliver shipment at destination airport." [Rule 3(b)] Air express

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* G. T. Miano, Agent, Official Air Express Tariff No. 1, C.A.B. No. 1.

presently guarantees same-day service. [Rule 4.5] Air express now allows transportation of live animal and bird shipments. [Rule 10] It offers a "signature security service" [Rule 24] and an armed guard. [Rule 25] A claim for a lost or damaged shipment can be filed with REA anywhere in the country. [Rule 28(A)(7)] The "priority service" provided by the airlines will require shippers to begin to distinguish among air carriers and will deprive them of a uniform basis and a single company through which to process loss and damage claims.

Air express service has been available to the public since the late 1920's, well before the enactment of the Civil Aeronautics Act. It is a customary and expected service under the terms of any unrestricted certificate of a common carrier by air. A contemplated discontinuation of air express provided by airlines with REA must obviously be supplanted by a resumption of that service by the air carriers alone. This is the intended function of the Board-ordered "priority service"; but the airlines still have neither ability nor intention to offer, for example, door-to-door pick up and delivery of freight, which has always been a part of REA air express.

National Small Shipments Traffic Conference, Inc. is a Delaware corporation with 285 members, of whom 22 are industry associations. It thus represents several thousand shippers and receivers of freight which rely on and need common carrier service for transportation of small shipments, including expedited transportation of small shipments by air.

Drug and Toilet Preparation Traffic Conference is an unincorporated association of approximately 900 firms who are represented in its membership either as individual members or through trade associations to which they belong. All of its members manufacture and distribute either ethical or proprietary drugs. All have need for common carrier small shipment transportation service including expedited transportation by air. The Conference speaks regarding transportation matters for some 1,000 firms who account for more than 90% of total sales volume of drugs, medicines and toilet preparations in the United States.

The Eastern Industrial Traffic League, Inc. is a membership corporation with 166 members consisting of industrial companies and associations with operations and interests primarily in the eastern part of the United States. A major reason for the League's existence is the protection of those interests of its members stemming from the fact that they rely on and need common carrier service for the transportation of general commodities in interstate commerce. Among the types of such transportation service important to its members is the transportation of small shipments, including expedited transportation of small shipments by air.

The shipper leagues were granted leave to intervene in the present proceeding by order of the Court dated June 14, 1974. By further order dated July 16, 1974, this Court granted a stay of the Board's Order No. 74-5-25 pending appeal.

SUMMARY OF ARGUMENT

The shipper leagues contend that air express service having the characteristics of REA's present service is a customary and necessary part of the air transportation which it is the duty of air carriers to provide. Since the Board's Orders require a termination of REA's service before any equivalent service is available to shippers, the Board's Orders require air carriers to violate their statutory duty and cannot be sustained.

STATUTES INVOLVED

Section 101(10) and (21) of the Federal Aviation Act of 1958, 49 U.S.C. § 1301(10) and (21) is set forth at p. 16.

Section 404(a)(1) of the Federal Aviation Act of 1958, 49 U.S.C. § 1374(a)(1) is set forth at p. 16.

Section 1(4) of the Interstate Commerce Act, 49 U.S.C. § 1(4) is set forth at p. 17.

Section 1(6) of the Interstate Commerce Act, 49 U.S.C. § 1(6) is set forth at p. 17.

Section 216(b) of the Interstate Commerce Act, 49 U.S.C. § 316(b) is set forth at p. 18.

Section 305(a) of the Interstate Commerce Act, 49 U.S.C. § 305(a) is set forth at p. 18.

Section 404(a) of the Interstate Commerce Act, 49 U.S.C. § 1004(a) is set forth at p. 18-19.

ARGUMENT

I. Air express is a well-defined service having essential traits.

The characteristics of air express service which make it necessary to the public and compatible with the operations of the participating air and ground carriers were fully set forth before, and ignored by, the Board. They are summarized in detail in the affidavit of Mr. Myron Smith which was submitted to this Court in support of a motion for a stay of the Board's Orders. This affidavit is again attached to this Brief as Appendix A.

Unlike air express traffic, the "priority service" ordered by the Board will have to be processed through each airline's airport freight terminal along with freight forwarder traffic and general freight traffic with a lower priority. No platform crew will be especially assigned and dedicated to the movement of traffic to the next available flight, as is the case now at airport express offices which the airlines maintain through the agency of REA. Further, the downtown shipper will no longer have available to him a downtown air carrier freight terminal as is now the case with air express to which he can bring his consignment for prompt dispatch to the airport if he wants to shortcut delay inherent in the street vehicle pickup at the consignor's door.

Today when the patron tenders his shipment for air express air lift he is entitled to expect its dispatch on the next available flight (within the limitations of the 59-minute rule*), regardless of the identity of the air carrier operating that flight. After effectiveness of the Board's Orders, the patron will have to research for himself the schedule of each airline's flights and make his own decision on the spot as to which one should receive the shipment for transportation in order to assure earliest dispatch. Obviously this decision becomes highly speculative and takes on the flavor of a game of roulette when the shipper desires street vehicle pickup service at a downtown point distant from the airport (assuming that the airline even makes such service available).

Finally, and perhaps most important, the shipper will be denied the uniform matrix of air express rates published in a single national tariff which heretofore he has been able to use in economically marginal situations when he makes a judgment whether to forward his traffic by air or dispatch it by surface. The Board's Orders presage a fragmentation of a national air lift system for air express into the confused jumble of bits and pieces which now characterize the rate sheets and multiple routing guides which must be consulted in order to obtain highway transportation. It builds into the priority air transportation system the same inefficiencies which now plague passengers who tend to spend more time getting to their airport of origin and from their airport of destination than they spend aloft between airports.

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* The 59-minute rule requires REA to distribute available air express traffic equally among all the airlines having suitable flights departing within 59 minutes from the time of tender by REA.

II. Common carriers, including air carriers, have a duty to provide express service.

The shipper leagues maintain that the Board's Orders must be annulled. Otherwise the air carriers will be required to cease a service to which the shipping public is entitled by statute.

Sec. 404(a)(1) of the Federal Aviation Act of 1958, 49 U.S.C. Sec. 1374(a)(1) requires "every air carrier to provide and furnish interstate ... air transportation, as authorized by its certificate, upon reasonable request therefor and to provide reasonable through service in such air transportation in connection with other air carriers; to provide safe and adequate service, equipment, and facilities in connection with such transportation; to establish, observe, and enforce ... just and reasonable classifications, rules, regulations, and practices relating to such air transportation ... "

This section has received scant judicial interpretation. The only reported case ruling on the duty of air carriers to provide service is Capital Airlines Inc. v. Civil Aeronautics Board, 281 F. 2d 38 (D.C. Cir., 1960). There, the Board's Order, requiring a certificated air carrier to extend its service to markets already authorized in its certificate where there was a potential demand for additional service not being fulfilled, was upheld by the Court. The Court's discussion of Sec. 404(a) is unique though not exhaustive. 281 F. 2d at 51;

"As the Board noted, Sec. 404(a) requires every carrier to provide 'air transportation, as authorized by its certificate' and to provide adequate service and facilities 'in connection with such transportation' (i.e., the transportation authorized by the certificate). A carrier may be certificated, upon request, if the Board finds that it 'is fit, willing, and able to perform such transportation properly' and that 'such transportation is required by the public convenience and necessity.' 72 Stat. 754 (1958), 49 U.S.C.A. Sec. 1371(d). In determining the public interest, the Board must observe the congressional declaration that the public convenience and necessity are enhanced by:

> 'The promotion of adequate, economical, and efficient service by air carriers at reasonable charges * * *' 72 Stat. 740 (1958), 49 U.S.C.A. Sec. 1302(c).
>
> 'Competition to the extent necessary to assure the sound development of an air-transportation system * * *' 72 Stat. 740 (1958), 49 U.S.C.A. Sec. 1302(d)."

While Sec. 404(a)(1) has not been often litigated its language is neither new nor unfamiliar. It finds exact counterparts in the Interstate Commerce Act. The duty of railroads to provide transportation upon reasonable request appears in Sec. 1(4) of the Interstate Commerce Act, 49 U.S.C. Sec. 1(4). A railroad's duty to establish, observe and enforce just and reasonable classifications, regulations and practices is found in Sec. 1(6) of that Act, 49 U.S.C. Sec. 1(6). Sec. 216(b) of that Act, 49 U.S.C. Sec. 316(b), prescribes the same duty for motor carriers. The duty of air carriers to provide safe and adequate service, equipment and facilities is also derived from the language of Sec. 216(b). Sec. 216(b) was added to the Interstate Commerce Act by the Motor Carrier

Act of 1935, 49 Stat. 558. Sec. 305(a), 49 U.S.C. Sec. 905(a), imposing the duties to provide transportation on reasonable request and to observe just and reasonable classifications, regulations and practices on water carriers, was added to the Interstate Commerce Act by the Transportation Act of 1940, 54 Stat. 934. Similarly the Freight Forwarder Amendment of 1942, 56 Stat. 286, imposed the same duties on freight forwarders by enacting Sec. 404(a) of the Interstate Commerce Act, 49 U.S.C. Sec. 1004. Congress, therefore, defined the duties of air carriers in the Civil Aeronautics Act of 1938 (now Sec. 404(a) of the Federal Aviation Act of 1958) during the same period it was employing the same language to define the responsibilities of regulated surface carriers. It effectively imposed on air carriers both the duty assumed by rail carriers to furnish transportation on reasonable request and the duty assumed by motor carriers to provide safe and adequate service, equipment and facilities. This is confirmed by the legislative history of the Civil Aeronautics Act. S. Rep. No. 1661, 75th Cong. 3d Sess. (1938) at p.2 explains:

> "The recognized and accepted principles of the regulation of public utilities, as applied to other forms of transportation, have been incorporated in S.3845. [The Civil Aeronautics Act of 1938]."

The comparison of the language of the Federal Aviation Act with that of the Interstate Commerce Act, and the above-quoted legislative history, showed that Congress intended air carriers to assume the same duties to the public as are borne by surface common carriers. See Arrow Aviation Inc. v. Moore, 266 F. 2d 488, 490 (8 Cir., 1959).

Even prior to the adoption of the Interstate Commerce Act, express service was deemed a part of common carriage. Express Cases, 117 U.S. 1 (1886), dissenting opinions of Mr. Justice Miller and Mr. Justice Field. (This question was expressly not reached by the majority, see 117 U.S. at 20.) The Interstate Commerce Commission has reached a similar conclusion interpreting Sec. 1(4) of the Interstate Commerce Act. In Closing of Express Stations in the Southwest and West, 288 I.C.C. 185, 194 (I&S 6032, 1953) the majority was "inclined to agree" that the primary duty to furnish express service rested with the Railway Express Agency, not with the railroads that controlled it; but the railroads had a separate "responsibility to the public to cooperate with the agency to the end that reasonably adequate express service be maintained ..." Commissioner Knudson, concurring in the result, disagreed with the majority approach to this point (at 199):

> "I think it is the primary responsibility of the railroads at common law and under the act to furnish reasonable express service ... the railroads may either fulfill these responsibilities directly or through the medium of an express company like the Railway Express Agency, or both ..."

Commissioner Knudson's view was echoed in the Commission's decision in Chicago & N.W. Ry. Co., Discontinuance of Service, 307 I.C.C. 585, 607 (Finance Docket 20681, Div. 4, 1959). There the Commission stated that the railroads have a duty independent of that of the Railway Express Agency to provide express service:

> "... even if the Railway Express Agency, Inc. did withdraw such contracts, the carrier is still responsible, under its obligation as a common

> carrier by railroad, for the transportation of such traffic as may be tendered to it and under such obligation would be required to transport such express traffic as might be tendered to it notwithstanding the absence of any contract with the Railway Express Agency, Inc."

Air carriers are common carriers and are required, as part of their duty to provide and furnish air transportation upon reasonable request, to offer air express service to the public. The question remains whether the Board can lawfully circumscribe that duty by ordering the departure of REA from air express service without requiring air carriers to institute an equivalent service beforehand.

III. Air common carriers may not at will withdraw traditionally provided service upon which the shipping public depends.

The Interstate Commerce Commission last year considered exhaustively a remarkably similar attempt by common carriers to withdraw services traditionally provided to the public. C.O.D. and Freight-Collect Shipments, 343 I.C.C. 692 (Ex Parte 272, 1973). The Commission decided that it could not permit carriers to withdraw C.O.D., freight-collect and order-notify services which had for many years been available to and widely used by shippers. Since Congress has provided for restricted entry into the transportation business, if these services may be withdrawn by certificated carriers there would be no-one else in a position to offer them. Thus at 343 I.C.C. 745 the Commission declared:

> "There are times when certain aspects of what we look upon as transportation go well beyond the confines of line-haul movements. And this is never more true than when carrier conduct with respect to those aspects has been static for many years. As a result, when traditionally provided services are suddenly and dramatically changed by the unilateral action of carriers (which is the situation demonstrated on this record), an interpretation by carriers based primarily on their assumed freedom to choose whether they will or will not provide certain services is highly vulnerable to attack. It would be wholly inconsistent with our basic philosophy of regulating modern-day transportation in the public interest, to allow carriers to transform the reliance of a vast segment of the business community on the continued availability of certain traditionally provided services into a matter of such little consequence. What we are saying is that a change has developed in the nature of the things to be done by carriers for shippers and receivers of freight by virtue of the fact that carriers have provided these services so extensively in the past.
>
> Certain acts performed by carriers for their customers will, owing to their nature, always be either

> transportation or nontransportation services. But when the nature of a given service is such that it can be performed only (or, at least, most satisfactorily) by a regulated transportation company as opposed to anyone else or any other means, that service often becomes one which falls squarely within the scope of transportation, the carrier's employment, and its duty to provide."

Air express is air transportation within the definition of Sec. 101(10) and (21), 49 U.S.C. Sec. 1301(10) and (21). These sections were construed by the D.C. Circuit in Philadelphia v. Civil Aeronautics Board, 289 F. 2d 770 (1961) which found that a truck movement from Philadelphia to Newark joined with carriage by air from Newark to Philadelphia constituted "air transportation" from Philadelphia to California under this statute. Likewise, air express (including surface transportation from and to airports) is entirely within the definition of air transportation in Sec. 101; and air carriers are required to provide it under Sec. 404(a)(1).

While the Interstate Commerce Commission required surface carriers to continue providing a necessary service traditionally offered shippers, the Civil Aeronautics Board here has taken exactly the opposite path. It has itself ordered REA to terminate its air express service before any equivalent replacement is available to the airlines or on the horizon. If the Board's Order is allowed to stand the air carriers will find themselves in the position discussed by the Interstate Commerce Commission in Chicago & N.W. Ry. Co., Discontinuance of Service, supra. They will have the obligation to perform air

express without the means of accomplishing it. Congress, in using almost identical language to describe the duties of surface and air carriers, could not have intended any difference in their obligation to provide express service. Either the I.C.C. order is incorrect or the Board's death knell for air express was unjustifiable.

CONCLUSION

For the foregoing reasons, this Court should reverse and annul Order Nos. 74-5-25 and 74-5-23 of the Civil Aeronautics Board.

Respectfully submitted,

The National Small Shipments
Traffic Conference, Inc.
Drug and Toilet Preparations
Traffic Conference
Eastern Industrial Traffic
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By their attorney,

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FEDERAL AVIATION ACT OF 1958

Section 101(10)

"Air transportation" means interstate, overseas, or foreign air transportation or the transportation of mail by aircraft.

Section 101(21)

"Interstate air transportation", "overseas air transportation", and "foreign air transportation", respectively, mean the carriage by aircraft of persons or property as a common carrier for compensation or hire or the carriage of mail by aircraft, in commerce between, respectively--

(a) a place in any State of the United States, or the District of Columbia, and a place in any other State of the United States, or the District of Columbia; or between places in the same State of the United States through the airspace over any place outside thereof; or between places in the same Territory or possession of the United States, or the District of Columbia;

(b) a place in any State of the United States, or the District of Columbia, and any place in a Territory or possession of the United Sates; or between a place in a Territory or possession of the United States, and a place in any other Territory or possession of the United States; and

(c) a place in the United States and any place outside thereof;

whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation.

Section 404(a)(1)

It shall be the duty of every air carrier to provide and furnish interstate and overseas air transportation, as authorized by its certificate, upon reasonable request therefor and to provide reasonable through service in such air transportation in connection with other air carriers; to provide safe and adequate service, equipment, and facilities in connection with such transportation; to establish, observe, and enforce just and reasonable individual and joint rates, fares, and charges, and just and reasonable classifications, rules, regulations, and practices relating to such air transportations; and, in case of such joint rates, fares, and charges,to establish just, reasonable, and equitable divisions thereof as between air carriers participationg therein which shall not unduly prefer or prejudice any of such participating air carriers.

INTERSTATE COMMERCE ACT

Section 1(4)

It shall be the duty of every common carrier subject to this part to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; and it shall be the duty of common carriers by railroad subject to this part to establish reasonable through routes with common carriers by water subject to part III, and just and reasonable rates, fares, charges, and classifications applicable thereto. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers.

Section 1(6)

It is hereby made the duty of all common carriers subject to the provisions of this part to establish, observe, and enforce just and reasonable classifications of property for transportation, with reference to which rates, tariffs, regulations, or practices are or may be made or prescribed, and just and reasonable regulations and practices affecting classifications, rates, or tariffs, the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, the carrying of personal, sample, and excess baggage, and all other matters relating to or connected with the receiving, handling, transporting, storing, and delivery of property subject to the provisions of this part which may be necessary or proper to secure the safe and prompt receipt, handling, transportation, and delivery of property subject to the provisions of this part upon just and reasonable terms, and every unjust and unreasonable classification, regulation, and practice is prohibited and declared to be unlawful.

Section 216(b)

It shall be the duty of every common carrier of property by motor vehicle to provide safe and adequate service, equipment, and facilities for the transportation of property in interstate or foreign commerce; to establish, observe, and enforce just and reasonable rates, charges, and classifications, and just and reasonable regulations and practices relating thereto and to the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, and all other matters relating to or connected with the transpertation of property in interstate or foreign commerce.

Section 305(a)

It shall be the duty of every common carrier by water, with respect to tranportation subject to this part which it undertakes or holds itself out to perform, or which it is required by or under authority of this part to perform, to provide and furnish such transportation upon reasonable request therefor, and to establish, observe, and enforce just and reasonable rates, fares, charges, and classifications, and just and reasonable regulations and practices, relating thereto and to the issuance, form, and substance of tickets, receipts, bills of lading, and manifests, the manner and method of presenting, marking, packing, and delivering property for transportation, the carrying of personal, sample, and excess baggage, the facilities for transportation, and all other matters relating to or connected with such transportation in interstate or foreign commerce. All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.

Section 404(a)

It shall be the duty of every freight forwarder to provide and furnish, upon reasonable request therefor, the service subject to this part covered by its permit issued under this part, and to establish, observe, and enforce just and

reasonable rates and charges therefor and just and reasonable classifications, regulations, and practices relating thereto and to the issuance, form, and substance of receipts and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation in service subject to this part, the facilities for such transportation, and all other matters relating to or connected with such transportation, and every unjust or unreasonable rate, charge, classification, regulation, or practice is prohibited and declared unlawful.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- x

REA EXPRESS, INC. et al, :

Petitioners, :

Docket No. 74-1661

-against :

CIVIL AERONAUTICS BOARD, et al, :

AFFIDAVIT

Respondents. :

- x

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

MARTIN S. SNITOW, an attorney-at-law duly admitted to practice in the State of New York and before this Honorable Court, hereby certifies under penalty of perjury pursuant to CPLR 2106 that he has served two copies of the foregoing brief by first-class mail, properly addressed and postage prepaid, this 29th day of July 1974, upon:

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Appendix A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REA EXPRESS, INC.,

Petitioner,

-against-

CIVIL AERONAUTICS BOARD,

Respondent.

No. 74-1611

AFFIDAVIT

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS:

Myron B. Smith, being duly sworn, deposes and says:

I. QUALIFICATIONS

1. I am Manager, Corporate Traffic Systems, American Home Products Corporation with offices at 685 Third Avenue, New York, New York 10017. I have held this position since June 1, 1970.

2. I have been in the employ of American Home Products Corporation for 28 years, 11 years as General Traffic Manager of the Boyle-Midway Division. My previous positions have been: Rate Specialist, Traffic Analyst, Assistant to Director of Traffic of American Home Products Corporation.

3. My experience in transportation extends over a period of 31 years in which time I was in the employ of a domestic freight forwarder (rate audit and revision department) and two other industrial concerns performing rate and audit functions.

4. I have been deeply involved in the many facets of rail, motor water and air carrier rate-making, on behalf of my employer and frequently

on behalf of shipper-interest associations.

5. I have participated as witness and/or ICC Practitioner in numerous regulatory proceedings relating to rail, motor, water and air carrier rules, regulations, rates and practices. I have also conducted numerous rate and tariff studies, an lyses by categories and type of traffic rules, regulations and practices.

6. In my present and more recent positions my duties and responsibilities have included researching, formulating, recommending, implementing and policing company traffic policies and procedures in connection with the receiving, warehousing, shipping, and movement of materials, supplies and products. I have also analyzed and developed techniques to reduce transportation and distribution costs to assure the most economical procurement, storage and delivery consistent with service requirements.

7. It has been my function to review and analyze statistical and traffic reports and freight rates applicable on company traffic and to recommend changes in routings, methods of distribution and to propose and substantiate with carriers and before regulatory bodies reasonable levels of rates, rules and regulations to apply to our traffic.

8. American Home Products Corporation is a member of The National Small Shipments Traffic Conference, Inc., Drug and Toilet Preparation Traffic Conference and Eastern Industrial Traffic League, Inc. I am a member of the Executive Committee of the Drug and Toilet Preparation Traffic Conference and chairman of its Motor Carrier Classification and Released Value Committees.

II. CHARACTERISTICS OF AIR EXPRESS SERVICE

9. From the point of view of the shipper, air express service has the following characteristics:

(a) The wide-spread availability of a trade name with a listed telephone.

(b) The wide-spread availability of a pickup service which gives the shipper access to air express service by a telephone call.

(c) The wide-spread availability of a receiving counter at each significant airport in the country where air express traffic can be tendered for expedited dispatch, and where the receiver can pick it up immediately upon completion of an air movement, if necessary.

(d) The wide-spread availability of a street vehicle delivery service which assures the shipper that in almost all cases, an air express shipment can be delivered to a customer without interposition of another ground carrier and without further monitoring of the movement by the shipper. Note that neither delivery nor pickup service availability from the shipper's point of view has anything to do with the air express terminal location where vehicles are garaged and shipments are sorted.

(e) On the one hand, the assurance to the shipper that air express traffic, once it reaches an airport terminal, is not delayed for consolidation with other traffic before it is given airlift dispatch, and on the other hand, relief from the relatively high minimum shipment charges which escalate the per cwt. mile cost of tendering shipments of 10 and 15 lbs. for air express transportation.

(f) Elimination of any need for the air express shipper to research and to specify routing via air carriers or ground carriers when requesting air express service or to supervise inter-airline transfers at airports. Choice of air carrier and choice of ground carrier must be entirely a function of air express management.

(g) Priority of loading over other air freight at the point of airlift dispatch; and

(h) A uniform pattern of air express rates applying throughout the country such that:

(1) the charge will not vary depending on which airlines may carry the traffic on a given traffic lane;

(2) the charge can be computed from a relatively small and simplified tariff format which eschews point-to-point rates; and

(3) the mileage curve on the basis which the progression of air express rates is established must be uniform throughout the country to avoid preference of some markets over others and prejudice of some sectors of the shipping public.

10. The foregoing characteristics of air express service, as seen from the shipper's point of view, in turn create some secondary characteristics of that service when viewed from the point of view of the air carrier or the ground carrier which attempts to implement delivery of a service with such attributes. From the point of view of the air carrier, the service

must have the following characteristics:

(a) To provide air express with priority loading rights aboard an aircraft, the air carrier must have a responsible source from which to obtain information on the volume of air express traffic which will be tendered for a given outbound flight. Without foreknowledge of this critical fact, the air carrier cannot make a timely decision concerning what volume of air freight to prepare for loading on that flight. This means, at each airport, there must be a central agency which receives air express for airlift dispatch and which can measure its volume and allocate sectors of that volume for each outbound flight.

(b) Outbound aircraft on an apron can accommodate only a limited number of ground vehicles coming to it for service. The airline consolidates its own air freight traffic at its own terminal, and thus need dispatch only one vehicle or one train of vehicles with air freight to a given outbound flight. It has the choice of requiring air freight forwarders to tender their traffic to it at its own freight terminal, or allowing each individual air freight forwarder to dispatch its own ground vehicle to the aircraft on the apron. Finally, the airline must accommodate post office vehicles dispatched to the aircraft, and, in the case of combination flights, the vehicles necessary to load passenger baggage and food and beverages for passenger consumption on the flight. In these circumstances, it becomes an operational necessity that the tender of air express traffic to a given outbound flight be accomplished in a single vehicle or in a single train of vehicles. This consideration reinforces the need for a consolidated air express receiving counter and

sorting terminal at every airport, and a standard, uniform arrangement between all airlines serving that airport and that air express terminal providing for the orderly dispatch of a vehicle from the air express terminal to each outbound flight with the air express traffic to be routed on that flight. No matter how many ground carriers may be involved in the air express operation, at the airport they must all agree upon a common agent or must choose one among them to deal with the airlines in the monitoring, measuring, and physical handling of air express traffic between the airport receiving counter and the individual aircraft.

(c) Air express service, being a premium service, commands a premium rate. At the same time, it eschews high minimum shipment charges. As a result, the carrier revenue per shipment is relatively low. In these circumstances, the airlines need relief from the expense of accounting for each individual shipment. This means that the ground carriers with whom they do business must assume accounting functions for them, both regarding revenues collected from the public and also division of those revenues tendered to the airlines as their share of the air express gross. Finally, this in turn mandates a reliable single accounting organization with which an airline can deal in doing air express business. The accounting rules governing handling of this traffic throughout the country for a given airline must be uniform in all regions and at all points in order to suppress a duplicate airline cost of accounting for the individual shipment transaction. The cost would be duplicate because the ground organization must inevitably itself engage in such transaction-by-transaction accounting operations.

11. The foregoing requirements, both from the shipper's and from the airline's points of view, governing air express service, create in turn characteristics which the service must have if one or more ground carriers are to render it efficiently:

(a) The wide-spread availability of telephone numbers, of pickup service, of delivery service and of airport terminal counter service which the public needs from air express service require that the ground carrier providing that service handle a significantly large volume of air express traffic in order to reduce the per unit cost of fixed factors of capital required to provide that service. There must be sufficient traffic to provide the ground fleet with good load factors. There must be sufficient traffic to justify the commitment of clerk time at telephone desks and behind receiving counters. It is hard to imagine any air carrier operation in the United States today which can support this sort of investment across the entirety of the country. Consequently, it is necessary that the fixed cost of these facilities be shared with surface traffic, as well as among the components of air express traffic. In short, the ideal type of ground carrier to collaborate with airlines in providing air express will be a ground organization already heavily committed to surface transportation.

(b) If more than one ground carrier participates in air express service, all participants must acquiesce in the doing of business under a common trade name in order to facilitate customer access both to telephone numbers and to off-airport and on-airport receiving and delivery counters.

(c) If more than one ground carrier participates in air express to the extent that the competing ground carriers serve the same airport, they must acquiesce in the choice of a single agent for the purpose of doing business with the airlines, and must also agree upon uniform operating rules for the tender of traffic to the airlines.

(d) The uniformity of rate structure for air express required throughout the country requires a multiplicity of ground carriers to agree on a single tariff publishing agent, and a single format and structure for air express rates.

III. IRREPARABLE HARM CAUSED BY CESSATION OF AIR EXPRESS SERVICE

12. My company and many thousands of shippers throughout the country have an urgent need for transportation service having the above characteristics of air express.

13. Shippers have been accustomed to using air express service for nearly five decades. This service has been available since the late 1920's, or about as long as airlines have been carrying passengers. It is an accepted and expected service for which no substitute is presently on the horizon.

14. Even if airlines at some time in the future inaugurate a new air express service using some agency other than REA, they will have to provide new equipment and facilities at today's inflated prices which will be reflected in inflated air express charges. Only if REA can continue service pending a decision by the Court can shippers hope to retain the benefits of REA's already established facilities. Not the least of shipper concern is the likelihood that any new service would face

"breaking in" problems associated with new equipment, new personnel, and new procedures. REA, in contrast, can be expected to continue its satisfactory service unless this Court permits its demise.

MYRON B. SMITH

Sworn to before me this
28th day of June, 1974.

NOTARY PUBLIC

FLORENCE MITTWOCH
NOTARY PUBLIC, State of New York
No. 03-[illegible]
[illegible] County
Certificate filed in New York County
Term Expires March 30, 1975